

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 02-CA-171515

Caption [use short title]

Motion for: Appeal against case decisionBell vs. NLRB

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COUNTY 1

Set forth below precise, complete statement of relief sought:

looking to appeal the case decision as the case was not reviewed thoroughly; lack of review on supporting evidence; careless decision making; emotional/psychological damages.

MOVING PARTY: Paula BellOPPOSING PARTY: Local 32BS/First Quality☒ Plaintiff☐ Defendant☐ Appellant/Petitioner☐ Appellee/Respondent

Olivia Ruth Singer, Esq.
Joseph Lockinger, Esq.

MOVING ATTORNEY:

OPPOSING ATTORNEY: James Woodley, Esq.

[name of attorney, with firm, address, phone number and e-mail]

apt-05 58th aveLandman Corsi Balkline & Ford, NYapt 35Tannenbaum, Helsen, Syracuse, LLC, NYCorona, NY 11368Local 32BS, NYCourt- Judge/ Agency appealed from: National Labor Relations Board

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☐ Yes☒ No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below?

☐ Yes☐ No

Has this relief been previously sought in this court?

☐ Yes☐ No

Requested return date and explanation of emergency:

Opposing counsel's position on motion:

☐ Unopposed☐ Opposed☒ Don't Know

Does opposing counsel intend to file a response:

☐ Yes☐ No☒ Don't Know

Is oral argument on motion requested?

☐ Yes☒ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes☒ No If yes, enter date:

Signature of Moving Attorney:

Paula BellDate: 05/30/18Service by: ☐ CM/ECF☐ Other [Attach proof of service]

**Federal Rules of Appellate Procedure Form 3. Petition for Review of Order of an Agency,
Board, Commission or Officer**

United States Court of Appeals for the Second Circuit

Paula Bell

Petitioner

v.

SL Green Realty Corp.

Respondent.

Petition for Review

*, hereby petition
the court for review of the Order of the XYZ Commission (describe the order) entered on the
22 day of February 192018

Paula Bell
/s/ Esq. Beth General Counsel
Attorney for Petitioners Matthew Murtagh
Address NRB

*See Rule 15.

SL GREEN REALTY CORP., AND FIRST QUALITY..., 2018 WL 1033494...

2018 WL 1033494 (N.L.R.B. Div. of Judges)

National Labor Relations Board

Division of Judges

New York Branch Office

**SL GREEN REALTY CORP., AND FIRST
QUALITY MAINTENANCE, AS JOINT
EMPLOYERS,
AND
SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ**

Case No. 02-CA-171515

JD(NY)-05-18

New York, NY

February 22, 2018

Matthew Murtagh, Esq., for the General Counsel.
James Woolsey, Esq. (Landman Corsi Ballaine & Ford,
New York, New York), for Respondent **S.L. Green Realty
Corp.**

Joseph Lockinger, Esq. (Tannenbaum, Helpert, Suracuse
& Hirschtritt, LLP), of New York, New York, for
Respondent First Quality Maintenance.

Olivia Ruth Singer, Esq. and Andrew Strom, Esq.
(Service Employees International Union, Local 32BJ), of
New York, New York, for the Charging Party.

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. Based upon charges filed by Service Employees International Union Local 32BJ (Union) the Regional Director of Region 2 of the National Labor relations Board issued a complaint, which was subsequently amended¹ alleging that **S.L. Green Realty Corp. (SL Green)** and First Quality Maintenance (Maintenance) (collectively Respondent) committed unfair labor practices in violation of Section 8(a)(3) and (1) of the National Labor Relations Act by discharging shop steward Paula Bell on or about December 3, 2015, in retaliation for her protected, concerted, and union activities. The two named Employers filed individual answers to the complaint denying that Bell was unlawfully discharged. Further, Respondent also argues, as an affirmative defense, that the Board should defer to the opinion and award issued pursuant to an arbitration, dated September 1, 2016, upholding Bell's termination.

I heard this case in New York, New York, on October 18 and 19, 2017. Upon the entire record, from my observation of the demeanor of the witnesses,² and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. Jurisdiction

SL Green owns and operates commercial properties in New York, New York, including an office building located at 420 Lexington Avenue, the property involved herein. At all material times, **SL Green** has been an employer-member of the Realty Advisory Board on Labor Relations (RAB), a multiemployer organization composed of employers operating buildings and employers acting as commercial cleaning contractors in New York City. As an employer-member, **SL Green** has authorized RAB to represent it in negotiating and administering collective bargaining agreements with the Union. First Quality Maintenance provides human resources consulting services for **SL Green** at its 420 Lexington Avenue facility. The relationship between the parties is memorialized in a consulting agreement which was characterized by **SL Green** property manager Paul Palagian as a "supervisory agreement where [Maintenance] overlook[s] Green's night operations." Pursuant to this agreement, Maintenance agrees to provide **SL Green** with janitorial advice regarding the type and number of employees required for cleaning and janitorial services, assignment of work and duties for **SL Green's** cleaning and janitorial personnel, advice regarding the type and quantity of cleaning and janitorial supplies, advice and representation in connection with arbitration proceedings, review of potential property acquisitions and assistance in preparing annual budgets.

Based upon the record and the admissions of the parties, I find that both **SL Green** and Maintenance meet the Board's standards for jurisdiction and that, for purposes of this proceeding at the least, they are joint employers.³

II. Alleged Unfair Labor Practices

SL Green employs several dozen cleaning workers at 420 Lexington Avenue. Paula Bell began working as a custodian at the 420 Lexington Avenue facility in approximately 2005. Her shift was Monday through Friday from 5 p.m. to 12:30 a.m. At the time of her termination, Bell reported to Sanada Cekaj, the building's night supervisor. Bell served as a shop steward from 2007 until her discharge, assisting coworkers with various

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complaints and raising workplace issues with her supervisors. She testified that this would occur on a weekly basis.

The Grievance Meeting and its Aftermath

On November 13, 2015, Bell was working and at around 10:30 p.m. she received a call from Cekaj, asking her to come to Cekaj's office. The call concerned an employee named Humberto Cabrera who had complained to his foreman about having difficulty breathing. There is testimony that Bell initially declined to attend the meeting, stating that she had too much work to complete, but within a short period of time Bell did come to Cekaj's office. In the interim, Cekaj had summoned another shop steward at the facility, Leon Suarez, who began serving as shop steward in October 2015.

Cabrera was visibly upset and, according to an email written by Cekaj summarizing the incident, spoke in a loud and disrespectful manner. Suarez served as an interpreter as Cabrera speaks limited English, and Cekaj speaks limited Spanish. Prior to Bell's arrival Cabrera stated that a cleaning product used previously by Cekaj was making him ill.⁴

Upon her arrival to Cekaj's office, Bell spoke with Cabrera in Spanish to calm him down. She asked whether Cekaj had offered Cabrera an ambulance or the opportunity to go home. Cekaj told Bell that Cabrera had refused an offer of medical assistance, which Cabrera confirmed.

The group proceeded to a bathroom located on the 8th floor of the building. They reviewed Cabrera's work cart and inspected the nearby bathroom. Cekaj testified that after her initial check of the bathroom she decided to return to the bathroom a second time and that Bell stood in the doorway to block her reentry. Bell denied doing so. Cekaj testified that Bell told her that Cekaj needed to answer to her about everything that went on in the building.

After the inspection was over, Cekaj told the group that the discussion was completed and everyone should return to work. Bell asked Cekaj what chemicals she had used to clean the bathroom and why she had been cleaning the bathroom in the first place since other experienced employees could have done such work. Cekaj testified that Bell's inquiry was conducted in a loud and insulting manner.

As the they rode in the freight elevator purportedly to return to their respective work stations, Bell stated that

Cekaj should check with Cabrera again to see if he needed or wanted medical assistance. Cekaj agreed to do so and Cabrera again declined. According to Cekaj, Bell stated that she needed to send Cabrera home and if she did not both she and the company would get in trouble, and she (Bell) would see to that. Bell then returned to her work station. There appears to be no dispute that Bell did not swear at Cekaj; physically threaten her in any way or refuse a work order.

Shop Steward Suarez confirmed that when he arrived at Cekaj's office, Cabrera was visibly upset, but told Suarez that he was all right and did not require medical assistance. He further testified that when Bell arrived at Cekaj's office she inquired as to whether the supervisors were putting chemicals into the water while employees were working; that her tone was "loud and disrespectful," Bell further stated that Cabrera looked "skinny" and that there would be big trouble.

Suarez further corroborated Cekaj's testimony that during the inspection of the 8th floor bathroom Bell was loud and disrespectful and asked why Cekaj would undertake to instruct experienced workers as to how to do their jobs. He further testified that Bell had, in fact, blocked Cekaj's reentry to the bathroom and that during the subsequent elevator ride to the mezzanine, Bell continued to insist that Cabrera be sent to the hospital or home notwithstanding that Cabrera had refused either option. He accused Bell of yelling, telling Cekaj what she needed to do to do her job and speaking loudly with a "big attitude."

On the following evening, November 14, Bell stopped by Cekaj's office with another employee to inquire what chemical Cekaj had use to clean the bathroom. Cekaj was on the phone and failed to acknowledge her. That afternoon, Cekaj had written an email, sent to both SL Green and Maintenance executives summarizing her version of what had happened on the prior evening. After discussing the events of the prior evening, Cekaj wrote: Paula continues to be a big distraction in the workplace, down talks the company and questions my authority she is leading the employees in the wrong direction, forcing any situation and insisting on going against for what the employees settle for. [It] seems that [she] has a need to rebel and try to intimidate me. She always makes herself the center of any issues that are going on while working because she wants to make it known that she's the shapstuart [sic] and feels that everything should be done as she says, no matter what the situation is and the outcome of it. She [tries] to intimidate the employees to go against me and just to prove a point that she could do anything in this building as she verbally said it herself

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because she's a union member and the shop steward who could make everything happen. I strongly feel that [Bell] is rebelling due to her last disciplinary action ...[Bell's actions and behavior is making my job extremely difficult and stressful. Her actions hinders work performance from employees and attitudes that lead to loss of productivity and an environment of hostility.

After receipt of this email, Maintenance Representative Raymond Yueh requested that the Union be spoken to with regard to Bell's behavior and added: [Bell] is stepping over the line and always trying to stir the pot. She continues to challenge [Cekaj] every chance she gets. I'd imagine this is not how the union would want their shop steward to represent 32BJ. Paula was recently suspended for her insubordinate behavior towards [Cekaj] and it doesn't seem like she is being phased nor is she letting up. Please let me know what the union plans on doing as this cannot continue.

Maintenance Labor Relations Executive Vincent Cutrupi replied that he would speak to the Union regarding these matters.

On November 17, at the end of the shift, Bell's forelady told her to report to Maintenance executive Brian Morell's office. Bell was given a disciplinary notice and indefinitely suspended. The disciplinary notice which included the heading "420 Lexington Avenue SL Green" stated that Bell was being suspended, pending investigation for "insubordination" and "failure to follow instructions." The notice further stated that Bell had "instigated [an] employee to act will willed towards his supervisor" and that Bell had "'questioned her supervisor about her job qualifications and involvement with building operations.'" On December 3, after approval by SL Green Property Manager Palagan, Bell's suspension was converted into a termination. Bell was notified that her suspension had been converted into a termination of her employment by way of letter from Cutrupi.

At the hearing before me, Bell denied raising her voice during the grievance meeting or thereafter and insisted that she remained polite throughout. She also denied trying to block Cekaj from entering the bathroom.

The Union initiated a grievance regarding Bell's suspension and subsequent termination which was thereafter submitted to arbitration. A hearing was conducted on June 30, 2016, to receive evidence regarding the matter. The Union and the Employer thereafter submitted posthearing briefs. On September 1,

2016, the arbitrator issued an award denying the Union's grievance in all respects.

The Arbitrator's Award

In sum, the arbitrator upheld Bell's discharge under both the National Labor Relations Act and the just cause provision of the collective-bargaining agreement between the parties. In concluding that Bell's discharge did not violate the Act, the arbitrator found that Bell's conduct on November 13 through 14, 2015, lost the protections of the Act as set forth by the Board in *Atlantic Steel Co.*, 245 NLRB 814 (1979).

More particularly, at the outset of the decision, after setting forth its procedural history, the arbitrator described the positions of the parties. As the Employer contended there, while as a shop steward, the Grievant (Bell) had a right, protected by Section 7 of the Act, to represent employees in their dealings with management, there are limitations to that right. While Bell was properly called to represent an employee in discussions with his supervisor, her subsequent actions went beyond her appropriate role in representing the employee and were beyond what were necessary to properly represent the employee. The Employer additionally made reference to the Bell's past history of similarly "egregious" behavior.

The Union argued to the arbitrator that Bell was merely representing an employee in the normal course of her duties as a shop steward, and was concerned that his complaint could affect not only him, but the health of other employees. The Union argued that the discussion between Bell and her supervisor (Cekaj) should be viewed in a different light: that the employee (Cabrera) was already upset before Bell arrived to represent him; that he was rightly upset because he felt that he was being forced to use chemicals injurious to his health and that the fact that such chemicals affect other employees was a reasonable conclusion. The Union further argued to the arbitrator that when Bell was acting as a representative of employees, she should be given wide latitude under the Act to act as an equal with management representatives. It was further argued that Bell's actions and comments were all within her rights under Section 7 of the Act.

The question, as framed by the arbitrator, was as follows: Did the Employer violated Section 8(a)(3) and (1) of the National Labor Relations Act when it terminated the Grievant? If so, what shall the remedy be?

In his discussion, the arbitrator noted that the Employer submitted for consideration numerous cases, most of

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which dealt with the issue of whether an officially designated representative is protected in dealings with management. In particular, the arbitrator considered *Atlantic Steel*, supra and its four-factor test as to whether an employee engaging in protected conduct can retain or lose those protections.⁶ Here, the Employer argued that Bell lost the protections of the Act when she questioned Cekaj's supervisory authority and threatened her in a loud manner.

In support of its contention that Bell's conduct was protected by Section 7, the Union cited a number of cases supporting its argument. Those discussed by the arbitrator included *Postal Service*, 360 NLRB 677 (2014), where a shop steward, in an angry confrontation with his supervisor, waved his finger at her and refused several orders to return to his work station; and *Union Fork and Hoe Co.*, 241 NLRB 907 (1979), where the employee in question knocked a supervisor's arm aside when being confronted. As the arbitrator noted, in both instances the actions of the employee in question were considered protected.

With regard to the foregoing argument, the arbitrator agreed with the Union that the Board has shown "remarkable leeway" with regard to the actions of shop stewards but here did not find Bell's actions to remain protected. As the arbitrator noted (and this is a basis for the General Counsel's and the Union's arguments against deferral): "In particular, her actions were the accumulation of her long history of insubordination and aggressive conduct for which she has been warned and suspended in the past."

The arbitrator found, after considering the testimony presented and the positions of the parties, as outlined above, that Bell's conduct was "'opprobrious conduct" as defined within the parameters of *Atlantic Steel*, supra and that she, therefore, lost the protections of the Act. Thus, it was found that the alleged violations of Section 8(a)(3) and (1) of the Act had not been established.

Going on to consider the termination, the arbitrator determined that Bell was discharged for just cause. It was noted that shortly prior to the instant discharge, she had been terminated on September 21, 2015, for insubordination and confronting her supervisor. The matter was settled by stipulation on September 25, 2015, where Bell was allowed to return to work with a 5 day suspension and a warning that any further instances of insubordination could result in her termination. The arbitrator further outlined other instances of prior discipline for similar alleged misconduct.

The arbitrator concluded that the Employer had demonstrated progressive discipline consistent with the collective-bargaining agreement and dismissed the grievance in its entirety.

Positions of the Parties in the Instant Case

The General Counsel contends that the arbitration award is deficient for three reasons.

First, it is argued, the arbitrator ignored Board precedent, including those cases cited in his award and in so doing clearly reached a conclusion contrary to Board law. Further, the arbitrator misapplied the *Atlantic Steel* test by incorrectly relying upon Bell's past discipline in upholding her termination, while at the same time ignoring evidence that Bell's protected steward activities were a motivating factor in her discharge. Finally, as the General Counsel argues, the arbitrator relied upon evidence of alleged misconduct not even cited by Respondent as a reason for the discipline at the time of the suspension and subsequent termination, such alleged misconduct which has been found by the Board to not rise to a level of such egregiousness as to lose the Act's protection. Thus, it is contended, Board law does not reasonably permit deferral.

The Union largely echoes the General Counsel's arguments here, arguing that Respondent has not met its burden of showing that Board law reasonably permits deferral to the arbitrator's award.

In sum, in support of the foregoing contentions, both the General Counsel and the Union have argued that: (1) Bell's conduct was and remained protected under the four-factor *Atlantic Steel* test; (2) that any prior discipline is inadmissible and irrelevant to determining whether an employee's conduct is protected under the Act; and (3) Board law does not reasonably permit the arbitrator's award.

Respondent argues that the arbitrator's decision is entitled to deference as a matter of law based upon the Board's current deferral standards.⁷ It is further argued that the arbitrator correctly relied on the controlling legal standard as set forth in *Atlantic Steel* and that, in this instance, Bell's conduct was sufficiently opprobrious to have lost such protection. Respondent notes that the arbitrator cited and applied the four-factor test as set forth in *Atlantic Steel* to determine whether Bell was entitled to the Act's protection for her conduct and that his resolution of disputed issues of fact was consistent with his role. With regard to Bell's prior disciplinary record, Respondent argues that to the extent the arbitrator considered it in

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conjunction with his *Atlantic Steel* analysis, such consideration is relevant to an analysis of the nature of Bell's conduct: that is, whether the conduct is impulsive and excusable under the circumstances or consistent with a pattern of prior misconduct.

The Standard for Deferral

In *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955), the Board decided that it would defer, as a matter of discretion, to an arbitrator's decision in cases where the arbitral proceedings appear to have been fair and regular, all parties agreed to be bound and the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act. Subsequently, the Board expanded that test and required that an arbitrator have considered the unfair labor practice or "statutory issue." See *Raytheon Co.*, 140 NLRB 883, 884885 (1963), enforcement denied, 326 F.2d 471 (1st Cir. 1964). In *Olin Corp.*, 268 NLRB 573, 574 (1984), the Board held it was sufficient if the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In addition, *Olin* placed the burden on the party opposing deferral to demonstrate that the deferral criteria were not met. *Id.*

Subsequently, in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014), the Board announced a new test for when post arbitral deferral would be appropriate, balancing the protection of employee rights under the Act and the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements. Thus, in order to adequately ensure that employees' Section 7 rights are protected in the course of the arbitral process, *Babcock* announced a new standard for deferring to arbitral decisions in 8(a)(1) and (3) cases.

Under *Babcock*, deferral to an arbitral decision is appropriate in 8(a)(1) and (3) cases where the arbitration procedures appear to have been fair and regular and the parties agreed to be bound (traditional requirements under *Spielberg* and *Olin*, not affected by this new standard). Moreover, the party urging deferral must demonstrate that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law "reasonably permits" the arbitral award. Thus, *Babcock* places the burden of proving that the deferral standard is satisfied on the party urging deferral, typically the employer, which is another change from the *Olin* standard. 361 NLRB No. 132, at 1128, 1131-1132.

In the instant case, the parties do not dispute that the first two requirements of the *Babcock* test have been met: thus, the arbitrator was confronted with and authorized to decide the unfair labor practice issue. And I agree. Here the arbitral award discussed facts relevant to the statutory issue and the arbitrator drew conclusions based upon the unfair labor practice evidence presented. Additionally, the arbitrator made a determination as to the real reasons for the Employer's actions, which leads me to the area of disagreement here: whether Board law "reasonably permits" the award issued by the arbitrator.

Before going on to decide this issue, it should be noted that the *Babcock* Board issued certain guidelines as to how the above standards should be interpreted and applied. As the Board discussed:

We shall find that the arbitrator has actually considered the statutory issue when the arbitrator has identified that issue and at least generally explained why he or she finds that the facts presented either do or do not support the unfair labor practice allegation. We stress that an arbitrator will not be required to have engaged in a detailed exegesis of Board law in order to meet this standard.

361 NLRB at 1133.

With regard to the specific issue of whether Board law reasonably permits the arbitral award, the Board emphasized that it meant that the arbitrator's decision must constitute a:

[R]easonable application of the statutory principles that would govern the Board's decision, if the case were presented to it, to the facts of the case. The arbitrator, of course, need not reach the same result the Board would reach, only a result that a decision maker reasonably applying the Act could reach. In deciding whether to defer, the Board will not engage in the equivalent of de novo review of the arbitrator's decision. *Id.*

III. Analysis and Conclusions

Applying the foregoing principles, I find that the arbitration award meets the *Babcock* standard. With regard to the unfair labor practice issue, the arbitrator relied upon the *Atlantic Steel* framework which had been urged by the parties and has been reiterated here. Thus, the arbitrator considered and applied that test and found that the grievant had lost the protections of the Act by virtue of her conduct.

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In the case before me, both the General Counsel and the Union take issue with the credibility of those witnesses who testified on behalf of Respondent. However, as noted above, a de novo review of the testimony presented to the arbitrator is not appropriate.⁸ Based upon the credited evidence, the arbitrator concluded that Bell's conduct was loud, abusive and disrespectful so as to lose the protections of the Act. In this regard, it should be noted that the arbitrator took note of Board precedent affording shop stewards great leeway during the course of presenting and handling grievances, but found them to be not controlling here.

The General Counsel contends that the arbitral award should not be deferred to because the arbitrator, relying upon particular Board precedent cited to him by the parties, found that while Bell's alleged misconduct was less egregious than that noted in those cases, it nevertheless lost the protection of the Act and thereby reached a conclusion contrary to Board precedent.⁹ In a related argument, General Counsel argues that the arbitrator misapplied the *Atlantic Steel* framework insofar as he relied upon Bell's past disciplinary history in deciding that she lost the protections of the Act by her conduct on November 13 and 14, 2015. As has been noted above, the arbitrator made reference to Bell's prior history of discipline both while considering both the statutory issue and in deciding that Bell's termination was properly for just cause.

In support of the foregoing argument, General Counsel relies, in part on *Postal Service*, 364 NLRB No. 62 slip op. at 3 (2016), where the Board rejected the judge's finding that, under an *Atlantic Steel* analysis an employee's protected conduct at a grievance meeting may lose its protection owing to separate events. However, in that instance it was the administrative law judge, and not an arbitrator, who reached that conclusion. As noted above, an arbitrator is not held to the same standard of interpretation and application of Board law as is its representatives.

General Counsel also relies upon the *Babcock* Board's distinguishing of the *Atlantic Steel* and *Wright Line*¹⁰ standards, asserting that the arbitrator improperly conflated the two.

However, as the Board has stated:

[I]f an arbitrator's decision can be fairly read as finding that discipline or discharge was for "cause" and not for protected activity, the decision would satisfy the part of the deferral standard requiring that Board law reasonably

permit the award.

361 NLRB at 1135 (emphasis in original).

Deferral is Appropriate in this Case

Here, it is not subject to dispute that the arbitral procedure was fair and equitable and all parties agreed to be bound. It is also conceded that the arbitrator considered the statutory issue. As noted above, the General Counsel and the Union argue that Board law does not reasonably permit the arbitrator's award. The General Counsel and the Union assert that Bell was discharged due to her activities as a union shop steward, and the consideration of any other factor is not consistent with the Act. Contrary to the contentions of these parties, I find the evidence, in light of the applicable law, establishes that the arbitrator could reasonably conclude that Bell's discharge was not due to her protected activities, but to conduct engaged in after the grievance meeting concluded in conjunction with her prior disciplinary record. In particular, the arbitrator agreed with the Employer's contentions that the statements and testimony of the witnesses established that Bell went "well beyond what was necessary to represent Cabrera" and that "after Cabrera left the area and went back to work, the Grievant continued to berate the supervisor."

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Board should defer to the arbitration award issued on September 1, 2016.
3. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.¹¹

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 22, 2018

Mindy E. Landow
Administrative Law Judge

Footnotes

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1 GC Exh. 2 containing this amendment is hereby entered into evidence.

2 The credibility resolutions here have been derived from a review of the testimonial record and exhibits, the inherent probabilities presented and the demeanor of the witnesses. To the extent testimony contradicts certain factual findings herein, such testimony has been discredited, either as having been in conflict with other credited testimony or other evidence or because it was in and of itself incredible and unworthy of belief.

3 It is black-letter law that two or more entities are joint employers of a single work force if they share or co-determine those matters governing the essential terms and conditions of employment. The relevant facts involved in this determination, to the extent they were developed on the record, demonstrate that **SL Green** and Maintenance co-determine aspects of employees' terms and conditions of employment and should be considered joint employers herein.

4 It appears from the record that Cekaj had demonstrated proper cleaning techniques to employees and had used floor stripper, not typically used to clean the bathroom. Neither Cabrera nor Bell were present for this demonstration.

5 Cabrera also received a first warning notice for "misconduct" stating that he had been "loud and disrespectful" and questioned Cekaj's supervisory authority over him.

6 Those factors are: (1) the place of the discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814 (1979).

7 In its posthearing brief, Respondent makes reference to a prior motion for summary judgment filed with the Board regarding this matter and supporting documentation. As is obvious, the motion was denied but without prejudice to reconsideration of the arguments supporting deferral.

8 Moreover, it would not be possible inasmuch as, typically, no official record of such proceedings is made.

9 I note that in *Babcock*, supra at 1128, the Board stated: "We believe however, that the General Counsel's proposal that deferral is warranted only if the arbitrator 'correctly enunciated the applicable statutory principles and applied them in deciding the issue' would set an unrealistically high standard for deferral."

10 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1981).

11 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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End of Document

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

Bell

CERTIFICATE OF SERVICE*

Docket Number: 02-CA-171515

v.

SL Green Realty Corp.I, Paula Bell, hereby certify under penalty of perjury that
(print name)on 05/31/18, I served a copy of 1 Motion appeal
(date)2 Motion For IFP

(list all documents)

by (select all applicable)**

☒ Personal Delivery ☐ United States Mail ☐ Federal Express or other
Overnight Courier☐ Commercial Carrier ☐ E-Mail (on consent)

on the following parties:

SL Green Realty Corp NY New York
Name Address City State Zip CodeFirst Quality Maintenance New York NY
Name Address City State Zip CodeUnion, Local 325T New York NY
Name Address City State Zip Code_____
Name Address City State Zip Code

*A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed.

**If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

05/30/18
Today's DatePaula Bell
Signature